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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1223

UNITED STATES OF AMERICA,

Petitioner,

v.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondents Allegheny Airlines, Inc., and GECC Leasing Corp. submit this joint brief in opposition to the petition filed by the United States of America for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Citations to Opinions Below

The opinion of the United States Court of Appeals is reported at 504 F. 2d 104. The findings and conclusions of the District Court are unreported.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals properly apply Rule 52(a), F.R.C.P., in determining that the findings of fact by the District Court were clearly erroneous?

Statement

On September 9, 1969, in the airspace over Fairland, Indiana, a mid-air collision occurred between an Allegheny Airlines DC-9-31 jet aircraft* being operated as Flight No. 853 and a Piper Cherokee aircraft being operated by student pilot Robert W. Carey. Both aircraft were totally destroyed and all occupants therein were killed. At the time of the collision the Allegheny aircraft was under an instrument flight rules (IFR) clearance from Cincinnati to Indianapolis and was receiving and adhering to air traffic control radar vectors (directions) from Merrill T. McCammack, an air traffic controller employed by the Federal Aviation Administration at the Indianapolis Approach Control facility located at Weir Cook Airport, Indianapolis, Indiana. The Piper Cherokee aircraft was being operated under visual flight rules (VFR) on a student solo cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana. The Piper Cherokee was owned by the Forth Corporation, a wholly owned subsidiary of the Brookside Corporation. Lee LeMay is the duly appointed personal representative of Robert W. Carey.

The instant action was commenced against the United States, Forth Corporation, Brookside Corporation and Lee LeMay as Administrator of the Estate of Robert W. Carey, deceased, on October 16, 1970, in the United States District Court for the Southern District of Indiana and immediately

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* One of the jet engines mounted on this aircraft was owned by GECC Leasing Corp. and had been leased to Allegheny Airlines.

assigned to the Honorable Cale J. Holder, who had previously been designated by the Judicial Panel on Multidistrict Litigation to coordinate discovery in all lawsuits arising out of this accident. See *In re Mid-Air Collision Near Fairland, Indiana,* 309 F. Supp. 621 (JPML 1970). Jurisdiction in the federal court was based upon diversity of citizenship and the Federal Tort Claims Act.

After all other litigation pending in the District Court arising out of this accident had been settled, the instant case proceeded to trial on October 10, 1972. At the conclusion of plaintiffs' case after twenty-seven trial days, Judge Holder directed a verdict in favor of Brookside Corporation; dismissed GECC as a party plaintiff on the ground that it was not the real party in interest; granted the Government's motion to dismiss under Rule 41(b), F.R.C.P., on the ground that the plaintiff Allegheny Airlines was contributorily negligent; allowed defendants Forth and LeMay to amend their answers to add the additional defenses of collateral estoppel based upon Judge Holder's determination of contributory negligence; denied plaintiffs' motions to dismiss said defenses as legally insufficient; granted the motions by defendants Forth and LeMay for summary judgment on said defenses; dismissed the complaint herein; discharged the jury, and entered judgments in favor of the defendants on November 29, 1972, and December 4, 1972, as against the plaintiffs. From these judgments plaintiffs appealed.

On September 16, 1974, the United States Court of Appeals for the Seventh Circuit reversed the judgments entered below in favor of the United States, Forth Corporation and Lee LeMay, Administrator, etc., and ordered a new trial, and affirmed the judgment below in favor of Brookside Corporation. In reversing the judgments below, the Court of Appeals found that the District Court was clearly erroneous with respect to its findings of fact and improperly excluded certain evidence relating to the facts. The Court of Appeals further found that GECC Leasing Corp. was the real party in interest with respect to the

engine claim, that the trial court had improperly stricken allegations of the complaint relating to vicarious liability under Indiana statutory and common law, and that directed verdicts on specified acts of negligence had been improperly granted in favor of the defendants.

Defendants Forth, LeMay and the United States moved for a rehearing *en banc*, which was denied by the Court of Appeals by a vote of six to two on November 26, 1974.

On February 24, 1975, Forth Corporation and Lee LeMay filed a joint petition for certiorari in this Court (Docket No. 74—1059). The Government docketed the instant petition on March 27, 1975.

Argument

The petition for writ of certiorari should be denied because petitioner seeks review of a non-final order granting a new trial; a new trial is necessary in any event because the trial judge improperly excluded evidence; a new trial is necessary in any event as to GECC Leasing Corp., which was held to be the real party in interest; this Court usually does not concern itself with an analysis and interpretation of the evidence; and the opinion below was correct.

POINT I

The Court of Appeals correctly reviewed the record under Rule 52(a), F.R.C.P., and this case is not worthy of review.

Petitioner asks this Court to grant certiorari on the basis that the Court of Appeals improperly reviewed the evidence on appeal. In essence, it wants this Court to review a 4,807-page trial transcript and thousands of pages of documentary exhibits to determine whether the Court of Appeals was correct in determining that the findings made by the trial judge were "clearly erroneous." As this Court stated in *United States* v. *Johnson*, 268 U. S. 220, 45 S. Ct.

496, 69 L. Ed. 925 (1925):

> "We do not grant a certiorari to review evidence and discuss specific facts." 268 U. S. at 227.

Accord: *Tacon* v. *Arizona*, 410 U. S. 351, 352, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924); *Houston Oil Company* v. *Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918); see *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503, 71 S. Ct. 470, 95 L. Ed. 483 (1951).

It is clear from the opinion by the Court of Appeals that the Circuit Court Judges approached their reviewing task with full knowledge and appreciation of their function:

> "In assessing the propriety of the district court's findings as to Allegheny's asserted contributory negligence, we note that the proper standard for review of such findings is whether they are clearly erroneous and not supported by substantial evidence." 504 F. 2d at 108.

It is also clear that the Court of Appeals made a detailed analysis of the evidence and found no support for the District Court's findings. Another review of the evidence is not needed, especially after the Court of Appeals denied petitioner's motion for a rehearing *en banc*.

Furthermore, such a review would be useless because the Court of Appeals also found that the District Court improperly excluded evidence relating to the weather conditions and rate of descent. 504 F. 2d at 109, fn. 4, and at 111, fn. 6. The petitioner has not assigned as error on this petition that the Court of Appeals was wrong in its assessment of the rulings by the District Court. Therefore, since there was other material and relevant evidence relating to weather conditions and rate of descent that was not considered by the District Court, a new trial is necessary.

In addition, a new trial is necessary in any event because the Court of Appeals held that GECC Leasing Corp.

was the real party in interest and should not have been dismissed from the lawsuit. The only "question presented" by the petitioner relates to the contributory negligence of Allegheny Airlines. Therefore, any review by this Court, even if it resulted in a reversal on the evidentiary point urged by petitioner, would still necessitate a new trial on the merits as to GECC Leasing Corp.

Since a new trial is inevitable in these proceedings, it would be wasteful to grant a review of this non-final order at this time. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 257-258, 36 S. Ct. 269, 60 L. Ed. 629 (1916).

POINT II

The decision below was clearly correct.

The Government basically argues in its petition that, because there was *some* evidence (implausible as it may be) to support the District Court's finding as to cloud height, it was error for the Court of Appeals to reverse. This argument ignores the standard for appellate review of findings of fact. The acknowledged standard is that set forth by Mr. Justice Reed in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 63 S. Ct. 525, 92 L. Ed. 746 (1948):

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U. S. at 395.

In reviewing the evidence, the Court of Appeals was aware that the collision occurred in an area approximately 20 nautical miles southeast of Weir Cook Airport located at Indianapolis, Indiana, and approximately 18 nautical miles north of Bakalar Air Force Base located at Columbus, Indiana. The Government conceded the collision altitude

to be 3,600 to 3,639 feet above mean sea level (MSL) (T. 4670-1). Weir Cook Airport is 797 feet above sea level and Bakalar is 656 feet above sea level. The time of collision was 1929 GMT (3:29 P.M. local time, i.e., E.D.T.).

Insofar as the base of the clouds is concerned, respondents introduced two photographs, a weather satellite photograph taken one minute before the collision (T. 3476-81) and a color photograph taken by an eyewitness approximately ten minutes after the accident (T. 421-2), which clearly show the presence of clouds in the collision area.

Mason McGraw, an eyewitness, testified that he saw the aircraft fall from the sky and the sky was ninety-five per cent cloudy with some light emitting through the clouds (T. 374-80).

Alpha Hammersley, the eyewitness who took the color photograph of the clouds, testified that she saw the Allegheny aircraft falling from the sky and in that area all of the sky was covered with clouds (T. 393).

Evan McColly, a meteorological technician employed by the United States National Weather Service, testified that he was on duty at Weir Cook Airport on September 9, 1969, and that he took numerous weather observations on that date (T. 430). The official United States Weather Bureau report for Weir Cook Airport on that date was admitted into evidence. Mr. McColly testified that at his 1255 local standard time observation (1755 GMT) the base of the clouds was measured at 2900′ above the ground (3697′ MSL) in a broken condition (.8 coverage) (T. 448). At 1355 LST (1855 GMT) the base of the clouds was estimated at 2900′ above ground level (3697′ MSL) and again with .8 sky coverage (T. 452). Shortly after the accident, at 1940 GMT McColly again took an observation and reported the base of the clouds at 3400 broken (4197′ MSL) with a 5000′ overcast (5797′ MSL, more than .9 coverage) (T. 454-6). Mr. McColly further testified that although he was the weather observer on duty at the time

of this accident, he was never requested by any Government agency after the accident to do an analysis of the weather in the area (T. 458).

Franklin Bellamy, who was a meteorological technician employed by the United States Air Force on September 9, 1969, testified that he took weather observations at Bakalar Air Force Base on that date and the official U. S. Weather Bureau report for those observations was admitted into evidence (T. 489-91). At 1658 GMT (1258 EDT) Bellamy observed and reported the base of the clouds at Bakalar as an estimated 2500′ above ground level (3156′ MSL) with another deck of clouds estimated at 8000′ AGL and with the sky cover at eight-tenths (T. 491-2). At 1755 GMT (1355 EDT) Bellamy again estimated the cloud base at 2500′ AGL (3156′ MSL) and 8000′ AGL with sky cover of eight-tenths (T. 493-5). At 1858 GMT (1458 EDT) the estimated cloud base was again 2500′ AGL (3156′ MSL) and 8000′ with a total sky cover of eight-tenths (T. 495).

Frank Griffith, a meteorological technician employed by the National Weather Service, testified that he was a weather observer at Bakalar on September 9, 1969, employed by the United States Air Force. Mr. Griffith testified that on said date he made a weather observation at 1957 GMT (1557 EDT) and estimated the base of the clouds at 2800′ above ground level (3456′ MSL) and 8000′ AGL with a total sky cover of eight-tenths (T. 514-6). At 2057 GMT (1657 EDT) Griffith made another observation and reported the base of the clouds at an estimated 2600′ above ground level (3256′ MSL) and 8000′ AGL and total sky cover of nine-tenths (T. 516-7). The official Weather Bureau report also contained a notation of a pilot report at 2008 GMT that the base of the clouds in the area was at 3300′ MSL (T. 518).

Captain Robert F. Johannesen, an American Airlines pilot, testified that on September 9, 1969, he flew a jet aircraft into Indianapolis along almost the identical route

as Allegheny 853 at approximately 1855 GMT (1455 EDT) (T. 3064-6). Captain Johannesen testified that when he was descending in the area southwest of the SHB VOR from 6000′ to 2500′ MSL, he flew into a thin overcast condition at approximately 6000′ and then through that into a broken layer which had a base at 3500′ MSL, which extended all the way to Indianapolis (T. 3068). Captain Johannesen estimated the sky cover of the broken layer at six-tenths (T. 3069).

Roy Whitehead, a general aviation pilot flying in the Indianapolis area on September 9, 1969, testified that he contacted IND Tower at a position 15 miles southeast of Weir Cook Airport at an altitude of 2500′ MSL at 1938:58 GMT inbound to Shank Airport (T. 3256-61). Whitehead further testified that he observed the weather in the area and that there was a broken layer of clouds the base of which was at 3000′ MSL with 70-80 per cent sky coverage (T. 3264-7).

Charles King, another general aviation pilot flying in the Indianapolis area on September 9, 1969, testified that he departed Shank Airport at approximately 1900 GMT bound for Louisville (T. 3294). Mr. King testified that after departing Shank he climbed to 2500′ MSL and headed in a general southeasterly direction (T. 3298). Mr. King contacted the IND Tower for radar service and maintained radar contact with them until 1911 GMT, when he was at a point 20 miles southeast of Weir Cook Airport (T. 3301). Mr. King further testified that he observed the weather at the point 20 miles southeast of the airport and that it was a broken to overcast condition with the base of the clouds at 3500′ MSL (T. 3302-4).

Frederick Schweibold, a helicopter pilot, was radar-vectored by IND Tower to the crash site within a half hour after the accident at an altitude of 1800 to 2500′ MSL (T. 3355-8). At 2010 GMT Schweibold was directly over the accident site and ascended his helicopter to within 500′ of the base of the clouds, which he judged to be between

3100 and 3300′ MSL. The cloud cover, in Schweibold's opinion, was overcast with an occasional ray of sunshine (T. 3359-61).

Phyllis Haupt, a general aviation pilot, was giving flight instruction in the Indianapolis area on September 9, 1969, when she was asked by the IND Tower to search for the downed Allegheny aircraft (T. 3379). Mrs. Haupt located the accident site at approximately 2010 GMT (T. 3383-4). At that time she deliberately observed the weather conditions in the area because she knew she would be later questioned about it (T. 3389-90). She testified that it was overcast, with slight breaks in the overcast, and that the base of the clouds was 3000 to 3500′ MSL (T. 3384, 3389).

Charles Bradley, who accompanied Mrs. Haupt in the search for the downed aircraft, testified that the weather in the area and over the accident site was a broken to overcast condition with the base of the clouds at 3600 to 3900′ MSL (T. 3419-25).

The final witness to testify concerning the weather was Conrad Gosset, a meteorologist, with a Master of Science Degree, retained as an expert by the respondents. Mr. Gosset made a complete review of all applicable weather information including official United States weather reports and testified that in his opinion at the time and place of the accident the base of the clouds was 3700′ MSL and that at this altitude the clouds covered between seven- and eight-tenths of sky. There was also a broken layer of clouds above this initial deck with a cloud coverage of eight- to nine-tenths. The winds aloft were blowing from the north-northwest to the south-southeast at a speed of 15 to 23 knots at altitudes of 3000 and 4000′ (T. 3472-5). This airflow caused cloud formations to drift from the north-northwest to the south-southeast (T. 3469-70).

The accident site was approximately 20 nautical miles southeast of Weir Cook Airport and approximately 18 nautical miles north of Bakalar Air Force Base. Evan McColly, the weather observer at Weir Cook Airport, tes-

tified that his observation at 1855 GMT (34 minutes before the accident) showed the clouds at 2900′ above the airport (3697′ MSL). This was the same as his observation at 1755 GMT. These 1755 and 1855 cloud formations are the ones that were moving south-southeast towards the accident site and towards Bakalar Air Force Base and could be expected to be over the accident site at the time of the collision, and not the clouds observed *over Weir Cook Airport ten minutes after the accident.*

Frank Griffith, another National Weather Service technician, observed the weather at Bakalar at 1957 GMT (27 minutes after the collision) and reported the cloud bases at 2800′ above the airport (3456′ MSL), and at 2057 GMT (1 hour and 28 minutes after the collision) he reported the clouds at 2600′ above ground level (3256′ MSL). These are the clouds that would have drifted down from the north-northwest.[1]

If the logic of the drifting cloud formations is considered along with the *impartial* observations of the pilots in the area (which ran from a low of 3000′ MSL to a high of 3900′ MSL), and this evidence is combined with the opinion of the *only* expert meteorologist who testified as to the weather at the time and place of collision (3700′ MSL), then it is simply impossible to establish that there was substantial evidence,[2] much less a preponderance of evidence,[3] that the Cherokee was operating 500′ or more below the cloud base.

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[1] The proffered testimony of the controller at Bakalar, which the District Court refused to accept and which the Court of Appeals held was error, indicated that ten minutes after the collision the weather was "closing in" on Bakalar and "getting darker."

[2] Petitioner's passing reference to the testimony of Charles Bradley in support of its position does not withstand a careful reading. Charles Bradley was in the area 30-40 minutes after the collision and he estimated the cloud base at 3600 to 3900′ MSL. In the same aircraft with Mr. Bradley was Phyllis Haupt, a much more experienced pilot who deliberately observed the weather conditions because she knew she would be asked about them, and she estimated the cloud base between 3000 and 3500′ MSL. At the same

(*footnote continued on following page*)

The Court of Appeals was therefore clearly correct when, upon a review of the entire record, it was convinced that a mistake had been committed and the District Court's finding as to the height of the clouds was clearly erroneous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(*footnote continued from preceding page*)

time that Bradley and Mrs. Haupt were in the area, Frederick Schweibold ascended his helicopter right over the accident site to within 500′ of the base of the clouds, which he judged to be between 3100 and 3300′ MSL.

Likewise, there is no concession as to the accuracy of the ceilometer at Weir Cook Airport. Indeed, even though the Weir Cook weather observer testified, the Government did not choose to utilize him to identify the ceilometer trace or introduce it in evidence.

[3] The burden of proof as to contributory negligence rested with the defendant. *Eggenschwiler* v. *Midwestern Motor Lodge Corp.*, 286 F. 2d 765 (7th Cir. 1961); *Schmidt* v. *Liesenfeld*, 379 F. 2d 380 (7th Cir. 1967).